

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

DAVID A. GAUNTLETT,

CASE NO. 5:CV 11-00455-EJD

Plaintiff(s),

v.

**ORDER DENYING PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

ILLINOIS UNION INSURANCE
COMPANY,

[Re: Docket Item No. 9]

Defendant(s).

/

This is a declaratory judgment action to determine coverage under a policy issued by Defendant Illinois Union Insurance Company (“Defendant” or “Illinois Union”), insuring David A. Gauntlett d/b/a Gauntlett & Associates’ (“Plaintiff” or “Gauntlett”) against liability for certain “Employment Practices.” Plaintiff was the defendant in an underlying “wage and hour” civil action, in which it claims Defendant’s duty to defend was triggered. Presently before the Court is Plaintiff’s Motion for Partial Summary Judgment, seeking an order that Defendant had a duty to defend the underlying lawsuit. Having reviewed the parties’ submissions, the Court finds this matter appropriate for decision without oral argument. Civ. L. R. 7-1(b). For the reasons described below, the Court DENIES Plaintiff’s motion for partial summary judgment.¹

///

¹ This disposition is not designated for publication in the official reports.

II. BACKGROUND

A. The Illinois Union Policy

Illinois Union issued Employment Practices Liability Insurance Policy No. 1262658 to Gauntlett, as the named insured, effective July 10, 2006 through July 10, 2007 (the “Policy”). The Policy Declarations Page states that it is an “Employment Practices Insurance Coverage Claims First Made and Reported” policy. It further provides:

THIS IS A CLAIMS-MADE AND REPORTED POLICY - PLEASE READ IT CAREFULLY.

NOTICE: THIS IS A CLAIMS-MADE AND REPORTED POLICY. EXCEPT AS OTHERWISE STATED, THE COVERAGE PROVIDED BY THIS POLICY IS LIMITED TO LIABILITY FOR EMPLOYMENT-RELATED DISCRIMINATION, EMPLOYMENT-RELATED HARASSMENT AND INAPPROPRIATE EMPLOYMENT FOR WHICH CLAIMS ARE FIRST MADE AGAINST THE INSURED WHILE THE POLICY IS IN FORCE AND THAT ARE REPORTED TO US DURING THE POLICY PERIOD OR ANY LIMITED OR EXTENDED PERIOD.

EMPLOYMENT PRACTICES INSURANCE

This policy covers Claims alleging **Employment-related Discrimination**, **Employment-related Harassment** and **Inappropriate Employment Conduct** liability in accordance with the terms, conditions, limitations and exclusions set forth in this policy. . . .

I. COVERAGE: WHAT IS COVERED

- A.** We will pay Loss amounts that the insured is legally obligated to pay on account of a Claim because of an Insured Event to which this policy applies. . . .
- B.** This policy applies only if:
 - 1.** A Claim is first made against the insured in accordance with Section **III. WHEN COVERAGE IS PROVIDED**;
 - 2.** The Claim is first reported in accordance with Section **III. WHEN COVERAGE IS PROVIDED** section and the **CONDITIONS** section **X. A. Duties in the Event of a Claim**; and

* * * * *

- C.** **Defense.** We have the right and duty to defend any Claim made or brought against any Insured to which this policy applies....

E. Duty to pay. We have the duty to pay any Loss that results from any Claim made or brought against any insured to which this policy applies.... We have the duty to pay Defense Costs incurred for the defense of any Claim which is controlled by us.

* * * * *

EXCLUSIONS: WHAT IS NOT COVERED

* * * *

C. Employee Retirement Income Security Act and Other Laws. This policy does not cover any Loss imposed on the insured under:

* * * *

2. The Fair Labor Standards Act (except the Equal Pay Act);

* * * *

7. Rules or regulations promulgated under any of such statutes or laws, amendments thereto or similar provisions of any federal, state or local statutory law or common law;

* * * *

J. Gain or Profit. This policy does not cover any Loss based upon, arising out of, or attributable to an insured gaining in fact any profit, remuneration or financial advantage to which such insured was not legally entitled.

* * * *

III. WHEN COVERAGE IS PROVIDED

A. This policy applies only to Claims arising out of an Insured Event that are first made or brought during the Policy Period and reported during the Policy Period or, if applicable, during the Limited or the Extended Reporting Period. A Claim is considered to be first made on the date a Management or Supervising Employee is served or first receives notice of a Claim. The date of Claim arising from a fact, situation or circumstance reported in accordance with the Notice of Potential Claim Condition will be the date notice is given under the policy.

B. Limited Reporting Period means the thirty (30) day period after the policy ends, during which Claims first made or brought during the Policy Period can be reported.

* * * *

XI. DEFINITIONS

A. Claim(s) means:

1. A written demand for monetary damages;

2. A civil proceeding commenced by the service of a complaint or similar pleading . . . against any insured, . . .

* * * *

B. **Defense Costs** mean those reasonable and necessary expenses that result from the investigation, settlement or defense of a specific Claim including attorney fees and expenses, . . .

* * * * *

F. **First Party Insured Event** means actual or alleged acts of Employment-related Discrimination, Employment-related Harassment, or Inappropriate Employment Conduct by an insured against an Employee, former Employee or applicant for employment with an insured entity.

G. **Inappropriate Employment Conduct** means any actual or alleged:

* * * * *

3. **Employment-related misrepresentation to, . . . an Employee, . . .**

* * * * *

6. Employment related libel, slander, defamation of character or **any invasion of right of privacy of an Employee, . . .**

H. **Insured Event** includes a First Party Insured Event . . .

* * * * *

I. **Loss**

1. Loss means the amount the insureds become legally obligated to pay on account of each Claim . . . made against them for . . . Inappropriate Employment Conduct for which coverage applies, including, but not limited to, damages . . . settlements and Defense Costs.

(Emphasis added.) See “Policy,” Docket Item No. 10-1.

B. The Tarzi Action

On May 9, 2007, Mariam Tarzi (“Tarzi”), a long-time Gauntlett employee, wrote a letter to David Gauntlett, demanding unpaid overtime wages, plus interest, for hours which she claimed to have worked as a non-exempt employee. Tarzi’s letter stated:

As you know, during my Nine (9) years of employment with the Firm, there have been numerous instances when I had to work more than eight (8) hours in one day or more than forty (40) hours in a week. The time records in the Firm's computer system confirm this fact. However, I have never been paid any overtime.

Although I have been classified as an exempt employee throughout my employment, I have since learned that I am not an exempt employee based on a number of factors, including but not limited to, the nature of my job duties and functions. In view thereof, I am entitled to and hereby request immediate payment for all of my unpaid overtime wages. As evidenced by the attached chart, I am owed unpaid overtime wages, plus interest. Please confirm your intent to honor your obligation regarding my overtime pay by this Friday, May 10, 2007, 9:30 a.m.

1 See Docket Item No. 16-2.

2 Gauntlet responded to Tarzi's letter on May 25, 2007, addressing her "claim for unpaid
 3 overtime wages," and denying that she was an exempt employee. On June 25, 2007, Gauntlet
 4 notified Illinois Union of the Tarzi claim arising from her May 9, 2007 letter and submitted 1) a
 5 copy of a Supplemental Claim Information form summarizing Tarzi's claim for unpaid overtime
 6 wages, 2) the letter from Gauntlet to Tarzi dated May 25, 2007, and 3) correspondence from the
 7 Employment Development Department regarding Tarzi's unemployment claim. See Docket Item
 8 No. 16-1.

9 On August 16, 2007, Tarzi filed suit against David Gauntlet and Gauntlet & Associates, in
 10 an action entitled Tarzi v. Gauntlet & Associates, et al., Consolidated Superior Courts of California,
 11 County of Orange, Central District, Case No. 07-CC-08999 (the "Tarzi action"). The complaint in
 12 the Tarzi action raised the following allegations:

13 5. Plaintiff became employed by defendant as a file clerk in June of 1998.
 14 From the onset of her employment, defendant classified her as an "exempt"
 15 employee, earning a monthly salary of \$3,200. . . .

16 6. In late 2000, in addition to her duties as defendant's file clerk, plaintiff was
 17 given additional job duties in that she began acting as defendant Gauntlet's
 18 personal assistant. . . . But for her file clerk duties, defendant Gauntlet
 19 assigned plaintiff her daily and weekly list of projects to be completed. . . .
 20 On many occasions, defendant Gauntlet required that plaintiff work late
 21 hours, on holiday and weekends to complete her assigned work.

22 7. In addition to the tasks set forth above, as part of her "exempt" duties,
 23 defendant Gauntlet assigned plaintiff to: . . . [various duties assisting
 24 Gauntlet in personal matters.]

25 8. As a result of the numerous and diverse tasks Plaintiff was required to
 26 perform by defendant Gauntlet, Plaintiff did not take rest periods, often did
 27 not take a lunch, or would eat at her desk. When Plaintiff did leave the
 28 office on a "lunch break," she often spent the entirety of her breaks running
 personal errands for defendant Gauntlet. Plaintiff worked overtime on a
 daily basis to meet defendant Gauntlet's demanding needs and deadlines.

* * * * *

25 10. On May 10, 2007, plaintiff provided defendant Gauntlet a letter regarding
 26 what she reasonably believed to be his choice to misclassify her as an
 27 "exempt" employee. She requested payment for her unpaid overtime hours.
 28 When plaintiff returned to work, she learned that all of her stored email
 communications, over 3000, had been deleted from her work computer.
 Plaintiff immediately brought this to the attention of defendant's
 Technology Manager who stated that he knew nothing about the missing

United States District Court

For the Northern District of California

1 documents. He looked at plaintiff's computer and did, however, confirm
 2 that someone had changed her settings and deleted of her stored e-mails.
 3 Plaintiff then advised defendant Gauntlett that someone had logged into her
 4 computer, manipulated the settings and deleted several thousand e-mails.
 5 Defendant Gauntlett had no response.

6

7 11. On May 14, 2007, after no written or verbal response to her demand for
 8 overtime compensation, Plaintiff gave her resignation. On May 17, 2007,
 9 defendant Gauntlett responded to plaintiff's resignation letter, by stating:
 10 "Preliminary, I would like to state that the firm absolutely disputes your
 11 claims for overtime wages." On May 25, 2007, he sent a follow up letter
 12 stating that Plaintiff was not entitled to overtime wages.

13 12. Plaintiff estimates that the total number of straight overtime hours worked
 14 between August 15, 2003 and May 14, 2007 to be in excess of 1131 hours.
 15 During this same time period, plaintiff estimates that the number of hours
 16 worked over 12 in a given work day and/or on legal holidays to be in excess
 17 of 117. Within this time period, plaintiff also estimates that the total number
 18 of days wherein plaintiff was either forced to perform work related tasks or
 19 personal ventures for defendant Gauntlett during her designated meal
 20 periods or simply could not take a lunch at all was in excess of 567. Finally,
 21 plaintiff estimates that the total number of missed rest breaks was in excess
 22 of 1512. To date, and despite her demands, plaintiff has not received any
 23 reimbursement for overtime hours, meal breaks or mileage reimbursement.

24 See Docket Item No. 10-2.

25 Based on the above alleged facts, Tarzi stated the following causes of action:

26 1. Failure to pay overtime wages (Labor Code §§ 1194, 1199);
 27 2. Failure to pay wages of terminated or resigned employees (Labor Code §§
 28 201-203, 1199);
 1 3. Failure to provide Rest Breaks and Meal Periods (Labor Code §§ 226.7 and
 2 512);
 3 4. Failure to comply with Itemized Employee Wage Statement Provisions
 4 (Labor Code § 226(B)); and
 5 5. Violations of the Unfair Competition law (Business and Professions Code
 6 §§ 17200-17208).

7 Docket Item No. 10-2.

8 Gauntlett provided notice of the Tarzi lawsuit to Illinois Union on or about September 4,
 9 2007, after it had been served with the summons and complaint. See Declaration of David A.
 10 Gauntlett in Support of Plaintiff's Motion for Partial Summary Judgment re: Illinois Union's Duty to
 11 Defend ("Gauntlett Decl."), ¶¶ 6-7. Gauntlett requested that Illinois Union defend Gauntlett in the
 12 Tarzi action and provided Illinois Union with a copy of Tarzi's complaint. Id. No additional
 13

1 information or documents were provided to Illinois Union by Gauntlett in connection with the Tarzi
2 action or Tarzi claim. See Declaration of Laura Zaroski in Support of Defendant Illinois Union
3 Insurance Company's Opposition to Plaintiff's Motion for Partial Summary Judgment ("Zaroski
4 Decl."), ¶ 7.

5 By letter dated September 27, 2007, Illinois Union declined coverage, claiming that the
6 allegations in the Tarzi action could not fall within the Policy's definition of covered "Loss" or were
7 otherwise excluded by the Gain or Profit, the Compensation Earned or Due, and the Employment
8 Contracts Exclusions. Gauntlett Decl., ¶¶ 6-7. Gauntlett paid for its own defense in the Tarzi
9 action, and the matter was resolved through settlement.

10 Plaintiff Gauntlett filed the instant declaratory judgment action in January 2011, seeking to
11 establish that Defendant Illinois Union had a duty to defend Gauntlett in the underlying Tarzi action.
12 See Complaint for Declaratory Judgment ("Complaint"), Docket Item No. 1. Plaintiff then filed a
13 Motion for Partial Summary Judgment re: Illinois Union's Duty to Defend ("Motion"), Docket Item
14 No. 9, and the Declaration of David A. Gauntlett in support of its Motion. Defendant filed its
15 Opposition to Plaintiff's Motion ("Opposition" or "Opp'n"), Docket Item No. 16, and submitted
16 Objections to the Gauntlett Declaration ("Objections"), See Docket Item No. 16-3. Plaintiff replied
17 to the Opposition ("Reply"), Docket Item No. 17, and filed its Response to Defendant's Objections
18 ("Response to Objections"), Docket Item No. 18.

19 III. LEGAL STANDARD

20 The standard applied to a motion seeking partial summary judgment is identical to the
21 standard for a motion seeking summary judgment of the entire case. A motion for summary
22 judgment should be granted if "there is no genuine dispute as to any material fact and the movant is
23 entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); Addisu v. Fred Meyer, Inc., 198
24 F.3d 1130, 1134 (9th Cir. 2000). The moving party bears the initial burden of informing the Court
25 of the basis for the motion and identifying the portions of the pleadings, depositions, answers to
26 interrogatories, admissions, or affidavits that demonstrate the absence of a triable issue of material
27 fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

28 If the moving party meets this initial burden, the burden shifts to the non-moving party to go

1 beyond the pleadings and designate “specific facts showing that there is a genuine issue for trial.”
2 Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324. A genuine issue for trial exists if the non-moving
3 party presents evidence from which a reasonable jury, viewing the evidence in the light most
4 favorable to that party, could resolve the material issue in his or her favor. Anderson v. Liberty
5 Lobby, Inc., 477 U.S. 242, 248-49, 106 S.Ct. 2505, 91 L.Ed.2d 202; Barlow v. Ground, 943 F.2d
6 1132, 1134-36 (9th Cir. 1991). Conversely, summary judgment must be granted where a party “fails
7 to make a showing sufficient to establish the existence of an element essential to that party's case, on
8 which that party will bear the burden of proof at trial.” Celotex, 477 U.S. at 322.

IV. DISCUSSION

10 A. Defendant's Objections to the Declaration of David A. Gauntlett

11 Defendant objects to paragraphs nine, eleven, and twelve of the Gauntlett Declaration on the
12 grounds that those sections contain inadmissible legal argument and conclusions. Objections at 1.
13 In response to these objections, Plaintiff argues that Mr. Gauntlett's personal knowledge is a proper
14 foundation for his testimony, and any conclusions he offers are “logical conclusion[s] that can be
15 drawn by any insured in Mr. Gauntlett's position as a defendant. . . .” Response to Objections at 1-
16 2.

17 Rule 56(c)(4) of the Federal Rules of Civil Procedure places three straightforward
18 requirements upon declarations that are filed in support of a motion for summary judgment. To
19 meet these requirements, a declaration must: 1) be based upon personal knowledge, 2) set forth
20 admissible facts, and 3) show that the declarant is competent to testify on the matters stated.

21 The testimony at issue, in paragraphs nine, eleven and twelve, characterizes the claims of the
22 Tarzi action and opines as to Defendant's obligations under the Policy. These statements are not
23 facts; they are legal arguments and conclusions which fail the admissibility requirement of Rule
24 56(c)(4). Therefore, to the extent that Mr. Gauntlett makes legal arguments and conclusions, the
25 Court will disregard his declaration.

26 B. Motion for Partial Summary Judgment

27 Plaintiff's principal argument is that the underlying Tarzi action triggered Defendant's duty
28 to defend. To determine whether a defense duty was owed, the court applies well-established law to

1 the terms of the Policy, in light of the Policy exclusions.

2 In California,² insurance contracts are to be interpreted in the same manner as any other
 3 contract, with the fundamental goal of giving effect to the mutual intention of the parties. Bank of
 4 the West v. Superior Court, 2 Cal. 4th 1254, 1264 (1992). To that end, “words in an insurance
 5 policy are to be read in their plain and ordinary sense. [Citation.] Ambiguity cannot be based on a
 6 strained instead of reasonable interpretation of a policy’s terms”³ McKee v. State Farm Fire &
 7 Cas. Co., 145 Cal. App. 3d 772, 776 (1983) (citation omitted); see also Am. Intern. Underwriters
 8 Ins. Co. v. Am. Guarantee and Liability Ins. Co., 181 Cal. App. 4th 616 (2010).

9 The language of an insurance policy determines whether alleged conduct falls within
 10 coverage. It is the insured’s initial burden to show that a claim potentially falls within the scope of
 11 the insurer’s coverages. Montrose Chemical Corp. v. Superior Court, 6 Cal. 4th 287, 300 (1993);
 12 Royal Globe Ins. Co. v. Whitaker, 181 Cal. App. 3d 532, 537 (1986); Collin v. Am. Empire Ins. Co.,
 13 21 Cal. App. 4th 787, 803 (1994). Whether coverage exists does not depend on the labels given to
 14 the causes of action in the third party complaint; instead it rests on whether the *alleged facts or*
 15 *known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.” Atlantic
 16 Mut. Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1034 (2002) (citing Hurley Constr. Co. v.
 17 State Farm Fire & Cas. Co., 10 Cal. App. 4th 533, 538 (1992).

18 An insured may not trigger the duty to defend by speculating about claims that have not been
 19 alleged or asserted. Golden Eagle Ins. Corp. v. Cen-Fed Ltd., 148 Cal. App. 4th 976, 988 (2007);
 20 Friedman Prof. Mgmt Co., Inc. v. Norcel Mut. Ins. Co., 120 Cal. App. 4th 17, 35 (2004) (the

21 ² California law governs this dispute. The Policy in this case contained no choice of law
 22 provision. Docket Item No. 10-2. In the absence of contractual language to the contrary, federal
 23 courts sitting in diversity apply the substantive law of the forum state. *Id.* at 980-81. The location
 24 of the Tarzi case (California), the location of the insured (California), California choice of law
 rules, the Policy’s place of execution and issuance (California), and the fact that Defendant regularly
 does business in California all compel the application of California law.

25 ³ Under most circumstances, when interpreting policy provisions, undefined terms should
 26 be interpreted as laymen would read them, not as they might be analyzed by an attorney or insurance
 27 expert. Lebas Fashion Imports of USA Inc. v. ITT Hartford Ins. Group, 50 Cal. App. 4th 548, 559
 28 (1996). Dictionary definitions may be useful, but a court must not “make a fortress out of the
 dictionary,” by disregarding the policy’s context. MacKinnon v. Truck Ins. Exch., 31 Cal. 4th 635,
 649 (2003). Rather, a court must “put itself in the position of a layperson and understand how he or
 she might reasonably interpret the exclusionary language.” *Id.*

1 potentiality rule for duty to defend depends on “possibility of actual indemnity coverage, not the
 2 mere existence of a plausible argument”); Gunderson v. Fire Ins. Exch., 37 Cal. App. 4th 1106, 1114
 3 (1995); Hurley Constr., 10 Cal. App. 4th at 538. Courts “look to the nature and kind of risk covered
 4 by the policy as a limitation upon the duty to defend” Gray v. Zurich Insurance Co., 65 Cal.2d
 5 263, 275 (1966). Any doubt as to whether the insurer must defend should be resolved in the
 6 insured's favor. United Pacific Ins. Co. v. McGuire Co., 229 Cal. App. 3d 1560, 1567 (1991). If
 7 there is no potential for covered damages as a matter of law, there cannot be any potential for
 8 indemnification, nor can there be a duty to defend. See, e.g., Royal Globe Ins. Co., 181 Cal. App. 3d
 9 at 536-537; Golden Eagle Ins. Corp., 148 Cal. App. 4th at 985; Scottsdale Ins. Co. v. MV Transp.,
 10 36 Cal. 4th 643, 655 (2005).

11 1. Policy Exclusions

12 The Policy excludes certain claims from coverage, including those seeking “[a]mounts owed
 13 under federal, state or local wage and hour laws” and resulting penalties. Such “wage and hour”
 14 claims are also omitted from the definition of an “Insured Event.” Additionally, the Policy bars
 15 coverage for any claims under the Fair Labor Standards Act (“FLSA”), or similar provisions under
 16 the California Labor Code or Business and Professions Code. See Policy; c.f. TriTech Software Sys.
 17 v. U.S. Specialty Ins. Co., 2010 U.S. Dist. LEXIS 132245, at *15-16 (C.D. Cal. Dec. 13, 2010)
 18 (explaining the purpose of an FLSA exclusion and the extent to which it covers similar state claims).

19 Plaintiff and Defendant agree that the Policy’s “FLSA Exclusion” and its narrow definition
 20 of “Loss” exclude coverage for all of Tarzi’s statutory wage and hour and derivative claims.⁴ See
 21 Opp'n at 13. Although such “wage and hour” claims are excluded from coverage, Tarzi could still
 22 maintain a claim for misrepresentation and/or invasion of privacy claims against Plaintiff. Even if
 23 an exclusion applies to a cause of action that is expressly pled, the defense duty may still arise for

24 ⁴ The court is unpersuaded by Defendant’s argument that the exclusion for gain or profit
 25 precludes separate claims for misrepresentation or invasion of privacy. See Opp'n at 15. An insurer
 26 relying on an exclusion must prove, through conclusive evidence, that the exclusion applies in all
 27 possible worlds.” Atlantic Mutual Ins. Co. v. J. Lamb, Inc., 100 Cal. App. 4th 1017, 1039-40
 28 (2002). There is no evidence that the alleged misrepresentation “necessarily result[ed] in gain” to
 Plaintiff. Moreover, the Tarzi action was *settled*, and thus did not “prove” or “adjudicate” that
 Plaintiff gained any profit or advantage from the misclassification or alleged misrepresentation.
 Accordingly, Defendant has not met its burden to support application of the gain or profit exclusion.

1 other claims that fall outside the excluded categories. National Union Fire Ins. Co. of Pittsburgh,
 2 PA v. Seagate Technology, Inc., 233 Fed. Appx. 614, 616 (9th Cir. 2007); Perkins v. Maryland Cas.
 3 Co., 388 Fed. Appx. 641, 643 (9th Cir. 2010). In other words, claims by Tarzi for misrepresentation
 4 and/or invasion of privacy against Plaintiff could proceed and succeed even if, as Plaintiff maintains,
 5 Tarzi were not entitled to unpaid wages. See, e.g., id. Therefore, the court considers whether claims
 6 of misrepresentation or invasion of privacy were potentially alleged in the Tarzi action, triggering
 7 the duty to defend.

8 **2. Misrepresentation Claim**

9 Plaintiff contends that the claims alleged in the Tarzi action gave rise to coverage under the
 10 Policy as an “employment-related misrepresentation.” Plaintiff seeks a broad construction of the
 11 Policy language to encompass what it claims are Tarzi’s allegations of misrepresentation.
 12 Defendant responds that Plaintiff is simply trying to create coverage where there is none.

13 In pertinent part, the Policy provided coverage for a “Loss” due to an alleged
 14 “Employment-related misrepresentation to . . . an Employee” The Policy does not define
 15 “Employment-related misrepresentation.” According to Plaintiff, this undefined term must
 16 reasonably include the tort of negligent misrepresentation, so long as it is “employment-related” and
 17 directed to an employee. Reply at 7. Thus, to trigger the defense duty, the underlying Tarzi action
 18 must allege facts that potentially cause Plaintiff to face liability for negligent misrepresentation.⁵

19 There are no allegations in the Tarzi action that create a potential claim for negligent
 20 misrepresentation. The underlying complaint is limited to allegations for failure to pay wages and
 21 related benefits, and seeks only damages limited to “amounts owed under wage and hour laws.” The
 22 Tarzi action did not allege any affirmative misrepresentations by Gauntlett, nor is misrepresentation
 23 a required element of any of the Tarzi causes of action, all of which related to wage and hour

24

25 ⁵ In California the tort of negligent misrepresentation consists of: (1) a misrepresentation
 26 of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with
 27 intent to induce another’s reliance on the fact misrepresented, (4) ignorance of the truth and
 justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5)
 damages. Fox v. Pollack, 181 Cal. App. 3d 954, 962 (1986) (citation omitted).

28

1 conditions of employment. To view these allegations as “employment-related misrepresentations” is
 2 a strained interpretation of the Policy language in light of the facts presented. See Cal. Diaries, Inc.
 3 v. RSUI Indem. Co., 617 F. Supp. 2d 1023, 1050 (E.D. Cal. 2009). For these reasons, the Tarzi
 4 action could not conceivably impose liability against Plaintiff for an “employment-related
 5 misrepresentation.”

6 **3. Invasion of Privacy Claim**

7 Plaintiff and Defendant dispute whether the underlying complaint raised allegations that
 8 potentially support a claim for invasion of privacy. Plaintiff bases its argument on Tarzi’s allegation
 9 that 3,000 e-mails were deleted from her work computer. Defendant denies that this allegation,
 10 without more, triggered the duty to defend Gauntlet from liability for invasion of privacy.

11 California courts have recognized that insurance coverage for “offense” based claims,
 12 including invasion of privacy, typically relate to one or more types of common law torts. See ACS
 13 Systems, Inc. v. St. Paul Fire & Marine Ins. Co., 147 Cal. App. 4th 137, 147 (2007); Fibreboard
 14 Corp. v. Hartford Acc. & Indem. Co., 16 Cal. App. 4th 492, 511 (1993). Pursuant to the doctrine of
 15 *ejusdem generis*, this conclusion is reinforced by the location of the term “invasion of right of
 16 privacy” next to other torts, such as libel and slander. See Policy.

17 California courts also recognize that coverage for “offense” based claims is not triggered
 18 simply because a third party complaint mentions an element of a covered claim; there is no duty to
 19 defend when the facts known to the insurer, viewed as a whole, establish that no such claim is
 20 potentially asserted. See, e.g., Microtec Research, Inc. v. Nationwide Mutual Ins. Co., 40 F.3d 968
 21 (9th Cir. 1994) (rejecting the insured’s argument that the “false statement” element of trade libel
 22 claim could be implied); Total Call Int. Inc. v. Peerless Ins. Co., 181 Cal. App. 4th 161 (2010) (all of
 23 the elements of a defamation tort must be alleged to trigger coverage); Nichols v. Great Am. Ins.
 24 Co., 169 Cal. App. 3d. 766, 775 (1985) (all of the elements of a trade libel tort must be alleged to
 25 trigger disparagement coverage).⁶

26

27 ⁶ Plaintiff misplaces its reliance on Michael Taylor Designs, Inc. v. Travelers Prop. Cas. Co. of Am., 761 F. Supp. 2d 904, 911 (N.D. Cal. 2011), in which the complaint alleged an injury of
 28 damage to reputation. From that language, the court implied a disparagement claim. Here, in
 contrast, Tarzi did not allege any injury from the e-mail incident.

1 Under California law, a privacy violation based upon “intrusion” consists of two elements:

2 First, the defendant must intentionally intrude into a place, conversation, or matter as
3 to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion
4 must occur in a manner highly offensive to a reasonable person. [Citation Omitted.]
5 These limitations on the right to privacy are not insignificant. [Citation Omitted.]
6 Nonetheless, the cause of action recognizes a measure of personal control over the
7 individual’s autonomy, dignity, and serenity. [Citation Omitted.] The gravamen is the
8 mental anguish sustained when both conditions of liability exist. [Citation Omitted].

9 Hernandez v. Hillsides, Inc., 47 Cal. 4th 272, 286 (2009) (holding that employer’s surveillance
10 system did not violate the plaintiff employee’s right to privacy); see also Shulman v. Group W.
11 Productions, Inc., 18 Cal. 4th 200, 231 (1998); Taus v. Loftus, 40 Cal. 4th 683, 725 (2007).

12 With the above “invasion of privacy” standard in mind, it is notable that the Tarzi complaint
13 alleges none of the essential elements: that her e-mail communications had been searched, that these
14 communications were personal, or that she had a reasonable expectation of privacy in the contents of
15 any of the deleted e-mail communications stored in her work computer. Tarzi also did not allege
16 that she was offended by the event or suffered mental anguish or any other damage as a result.
17 Again, the only damage alleged is in the form of lost wages and penalties caused by Labor Code
18 violations.

19 Plaintiff’s position that Tarzi intended to state a claim for invasion of privacy is further
20 undermined by case law. Courts generally refuse to find a reasonable expectation of privacy in an
21 employee’s use of an employer’s computers. See, e.g., Holmes v. Petrovich Development Co., LLC,
22 191 Cal. App. 4th 1047, 1069 (2011) (concluding that an employee had no reasonable expectation of
23 privacy in her personal e-mail messages sent to her attorney using her employer’s computer and
24 consequently could not prevail on an invasion of privacy claim); TBG Ins. Services Corp. v.
25 Superior Court, 96 Cal. App. 4th 443, 452 (2002) (“. . . use of computers in the employment context
26 carries with it social norms that effectively diminish the employee’s reasonable expectation of
27 privacy with regard to his use of his employer’s computers.”); Bohach v. City of Reno, 932 F. Supp.
28 1232, 1236 (D. NV 1996) (Employers providing computers and electronic communication service to
their employees can “do as they wish when it comes to accessing communications in electronic
storage.”). Courts have also found the element of “offensive conduct” lacking in the employment

1 setting. For instance, the court in Hilderman v. Enea Teksci, Inc., 551 F. Supp. 2d 1183 (S.D. Cal.
 2 2008) granted summary judgment against an employee's cause of action for invasion of privacy
 3 arising from an employer accessing his e-mail account on his work computer. The intrusion in that
 4 case was "not highly offensive" because, in part, there was no evidence that the employer used the
 5 laptop to access the employee's personal e-mail account or otherwise pry into the employee's
 6 personal affairs. Id. at 1204.

7 Similarly here, Tarzi could not expect privacy in her work computer nor do the facts alleged
 8 support a claim that the conduct was highly offensive. Plaintiff's Motion cites to various case
 9 authorities, many from outside California, for the proposition that e-mails are accorded legal
 10 protection against invasion of privacy. However, none of those cases considered issues involving an
 11 employer's intrusion into an employee's e-mail account at work.⁷ In comparison, Tarzi did not
 12 allege that Plaintiff viewed her private emails.⁸ The underlying complaint only alleges that Tarzi's
 13 stored email communications had been deleted from her work computer. The facts of this case are
 14 distinguishable from cases in which a defendant hacks into someone's home computer or personal e-
 15 mail account for purposes of discovering personal information.

16 A privacy violation of "intrusion upon seclusion" requires a reasonable expectation of
 17 privacy and highly offensive conduct. Neither of these essential elements is alleged in the Tarzi
 18

19
 20
 21 ⁷ See City of Ontario v. Quan, 130 S.Ct. 2619, 2631 (2010) (noting that the company's
 22 audit of employee's messages on the employer-provided page was not nearly as intrusive as a search
 23 of his personal e-mail account or page, or a wiretap on his home phone line, would have been");
United States v. Forrester, 512 F.3d 500, 511 (9th Cir. 2008) (a non-employment case involving the
 24 government's surveillance of an individual's internet and e-mail activity); O'Connor v. Ortega, 480
 U.S. 709, 718 (1987) (concerning a search of an employee's desk and file cabinet; not computer);
Haynes v. Office of the AG, 298 F. Supp. 2d 1154, 1161-1162 (D. Kan. 2003) (alleged intrusion was
 25 the viewing of an employee's "private information contained on his work computer").

26 ⁸ Plaintiff argues that the exact nature of the 3,000 e-mails is unclear; the allegation does
 27 not specify whether they were personal e-mails or a mix of personal and business e-mails. Motion at
 28 12. At the very least, Plaintiff contends, this is a factual issue to be determined at trial and, as a
 result, it raises the potential for coverage. Motion at 13; Reply at 6-7. The court disagrees and finds
 that the facts known to the insurer, viewed as a whole, raise no threat of *potential* liability for a
 claim of invasion of privacy.

1 complaint, nor are facts potentially supporting those elements pled.⁹ Moreover, Tarzi seeks only
2 damages for wage and hour violations, instead of emotional distress or other consequential damages
3 that might be expected to flow from a claim for invasion of privacy. Considering all of the
4 circumstances, the court concludes that the Tarzi complaint did not allege facts that support a
5 potential claim of invasion of privacy.

6 **V. CONCLUSION**

7 Neither party argues that triable issues of material fact remain regarding Defendant's duty of
8 defense in the Tarzi action. Rather, the parties dispute the application of law to those facts. The
9 court agrees with Defendant's reasoning and concludes that summary judgment cannot be granted in
10 Plaintiff's favor. Applying the law to the facts of this case, the court finds that the Tarzi action is
11 based solely on "wage and hour" claims; Plaintiff faced no potential liability to Tarzi for claims of
12 misrepresentation or invasion of privacy. Since the Policy terms clearly preclude wage and hour
13 claims from coverage, Defendant owed Plaintiff no obligation to defend the Tarzi action.
14 Accordingly, Plaintiff's Motion for Partial Summary Judgment is DENIED.

15 In its Opposition, Defendant briefly "urges the Court to grant summary judgment in its
16 favor." Opp'n at 23. While the court finds no remaining issue of triable fact, it grants only the
17 properly noticed motion before it. Because Defendant's request was not properly noticed or argued,
18 it will be disregarded by the court.

19 Plaintiff and Defendant are referred to the court's ADR Program at (415) 522-2199. The
20 parties shall contact the ADR program no later than **December 9, 2011**.

21 ///

22 ///

23

24

25

26

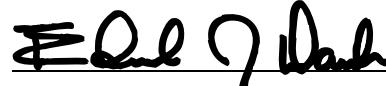
27

28 ⁹ The court does not consider the merits of Tarzi's allegations; only whether those
allegations are sufficient to state *potential* claims for any form of invasion of privacy.

1 IT IS HEREBY ORDERED that a Case Management Conference will be held in this matter
2 before the Honorable Edward J. Davila on **December 16, 2011 at 10:00 a.m.** in Courtroom No. 1,
3 5th Floor, 280 S. First Street, San Jose, California. On or before **December 9, 2011** the parties shall
4 file a joint case management conference statement.

5 **IT IS SO ORDERED.**

6 Dated: November 1, 2011



7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

EDWARD J. DAVILA
United States District Judge